NO. 82-1071

In The Supreme Court
of the
United States

October Term, 1983

Aluminum Company of America, et al.,
Petitioners,
v.
Central Lincoln Peoples' Utility District, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS PORTLAND GENERAL ELECTRIC COMPANY, CP NATIONAL CORPORATION, PACIFIC POWER & LIGHT COMPANY, PUGET SOUND POWER & LIGHT COMPANY, MONTANA POWER COMPANY, AND IDAHO POWER COMPANY

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QUESTION PRESENTED

Whether the longstanding priorities utilized by the Bonneville Power Administration (BPA) to market nonfirm federal power were altered by enactment of the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act)?[1]

[1] This is not a new issue raised for the first time in this Court. Investor-owned utilities asserted during contract negotiations that the Regional Act did not require BPA to alter its existing policy for marketing nonfirm power. [Contract Official Record of BPA's negotiation of DSI contracts, COR 8451] The public utilities took this position in their initial brief to the Ninth Circuit. [*Preference Customer Memorandum*, at 29]

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STATEMENT OF THE CASE

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power & Light Company, Montana Power Company, and Idaho Power Company (hereinafter "investor-owned utilities")[1.5] generally concur in the historical facts presented in Federal Respondents' brief. However, the investor-owned utilities do not agree with the construction of the Regional Act urged by Federal Respondents or Petitioners in their Statement of the Case. Nor do the investor-owned utilities agree that nonfirm power was arbitraged by preference utilities to utilities outside the Pacific Northwest prior to passage of the Project Act.[2] The impact of BPA's decision upon investor-owned utilities' interests, operations, or ratepayers is not described in Petitioners' brief or made a part of the administrative record.

1. Background

Respondents investor-owned utilities serve over two million customers. Though they own or purchase from nonfederal sources much of their power supplies, they traditionally have acquired large amounts of power from BPA. The obligation of BPA to supply federal power to investor-owned utilities was confirmed by the Regional Act.[3]

[1.5] Subsidiaries and affiliates of investor-owned utilities are: *Portland General Electric Company:* Northwest Energy Services Company, Pacific Northwest Power Company; *CP National Corporation:* Cogeneration National Corp., Buckeye Supply West; *Pacific Power & Light Company:* Pacific Telecom, Inc. (subsidiary of PP&L holds majority of voting stock); *Puget Sound Power & Light Company*: Cascade Geothermal Development Venture, Renton Village Company, Northwest Energy Services Company.

[2] Petitioners cite the Joint Appendix (hereinafter "J.A.") at page 29 as support for this conclusion. Brief of Pet., pp. 12-13, n. 30. An examination of the referenced document reveals that it was *BPA's* policy, after all regional loads were met and water could not be considered for later use in the region, to offer surplus power for sale to the Pacific Southwest over the California Intertie. *Id.* The proposition that nonfirm power was arbitraged by preference utilities is not supported by any of the citations or references made by petitioners.

[3] *See, e.g.*, 16 U.S.C. § 839c(b)(1).

BPA has contracts with investor-owned utilities to supply power and transmission services. The agreements require generating facilities of both parties to be operated in an economically efficient manner. Because of the physical and contractual relationships among utilities and BPA, investor-owned utilities have a substantial financial interest in the planning and operation of the federal system. They actively participate in all regional processes which significantly may affect the capability of their systems or the federal system to supply power.

2. Nonfirm Energy Purchases From BPA

Investor-owned utilities have use for and historically have purchased nonfirm energy[4] from BPA. Prior to enactment of the Regional Act, BPA interpreted its statutory directives to require the allocation of nonfirm power as follows:

> "Nonfirm energy is available when there is more than enough water in Federal reservoirs to meet the Federal system's firm energy commitment. The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads; (4) when not all secondary demands can be met, the remaining energy is split approximately equally between the private utilities and the direct-service industries of the region; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal

[4] Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing. It is provided only when water level in the Northwest is greater than that which is deemed critical. BPA plans on having at least the amount of power that it can produce at critical water level and that power is therefore firm power. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d 708, 710 n. 1 (9th Cir. 1982).

> generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie."[5]

This longstanding agency marketing policy afforded equal treatment to investor-owned utilities' and DSIs' requests for nonfirm power.

Immediately after passage of the Regional Act, BPA's management construed the new statutes to require elevation of DSI applications for nonfirm power [items (4) and (5) of the quoted policy, *supra*] above not only investor-owned utilities' but also public agencies' rights.[6] Hence, DSIs were deemed first in line for nonfirm energy, public agencies second, and investor-owned utilities third. This change deprives investor-owned utilities of the opportunity to buy nonfirm energy under many operating conditions. The Ninth Circuit refused to accept BPA's belief that Congress committed increased service to the DSI's, and in effect reinstated the marketing priorities which preexisted the Regional Act.[7]

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[5] BPA, U.S. Department of Energy, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereinafter "EIS"), p. IV-71 (December 1980); J.A. 29.

[6] COR 254. Documents from BPA's administrative record are cited to the page in the Contract Official Record (COR) at which they appear.

[7] If, as the DSIs and government contend, the power was intended for and "committed" by Congress to the DSIs, then this ends the Court's inquiry. Investor-owned utilities and their customers will suffer the economic consequences of limited access to inexpensive federal power through such an allocation until such time as investor-owned utilities' claims to federal power are fully litigated and a record developed which demonstrates the economic impact. However, if the power was not "committed" by Congress to the DSIs, then it remains as nonfirm power, the priorities of which were not established or, more importantly, altered in the Regional Act.

3. Investor-Owned Utilities' Position During Negotiation Of New DSI Contracts

Investor-owned utilities participated in the negotiations resulting in the challenged DSI contracts. Vigorous opposition was aimed at the provisions concerning enhanced service to the DSI first quartile. The position of investor-owned utilities was expressed in the following manner:

> "[T]he prototype contract goes far beyond the requirements of any reasonable reading of the Act and attendant congressional reports in providing for enhanced availability of service to DSI top quartile.
>
> * * * * *
>
> "We have yet to find any statement to Congress or by a member of Congress indicating any intent to add the equivalent of nearly 1,000 megawatts of firm load to the Pacific Northwest. Surely, a matter of such magnitude would have been discussed and debated at length before Congress."[8]

It was also submitted that "any increased commitment on BPA's part to serve the top quartile of DSI loads will require a change in BPA's marketing policy for nonfirm energy."[9]

4. Investor-Owned Utilities' Participation In Proceedings Below

Investor-owned utilities intervened in this suit and were aligned with the public agencies by the court. Like the public agencies, the utilities have a direct interest as competitors for the power which the DSIs and federal government contend was committed to the DSIs. However, investor-owned utilties do not seek an abstract or general inquiry into the role of preference in the Bonneville Project Act (16 U.S.C. § 832c(a), et al.) and Regional Act; the factual administrative record necessary for such interpretation is absent. It is evident from the record that the dispute between the public agencies, BPA and the DSIs can be resolved by resort to the statutory language and longstanding administrative applications.

[8] COR 8451

[9] *Id.*

SUMMARY OF ARGUMENT

Investor-owned utilities submit that while the result reached by the Ninth Circuit was correct, the facts that would enable the Court to base its decision on the preference clause[10] are absent. The Court should confine its review to the question of whether the Regional Act requires BPA to change the priority given to DSIs' requests for power.

Prior to enactment of the Regional Act, public agency requests for nonfirm power were given preference; if nonfirm energy remained, it was allocated evenly between investor-owned utilities and DSIs. Congress was aware of this marketing scheme and is deemed to have adopted it as a part of the Regional Act, absent explicit language to the contrary. BPA's position during contractual negotiations of new DSI contracts reflected a misinterpretation of the statutes. Although entitled to deference, BPA's implementation of the Regional Act need not be accepted. The decision of the Court of Appeals should be modified, but affirmed.

ARGUMENT

1. The Result Reached by the Ninth Circuit was Correct, but the Scope of its Decision Should be Limited.

The Ninth Circuit held that BPA's interpretation of the Regional Act was incorrect *and* was inconsistent with the preference requirements of 16 U.S.C. § 839g(c). *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F. 2d 708, 711 (9th Cir. 1982). Although investor-owned utilities agree that the Regional Act was misconstrued by BPA, the court should have limited its holding to this finding. There was an inadequate basis for its decision that the preference clause was violated.

a. Judicial Restraint

The court below should not have considered in the abstract whether the preference clause applied generally to power sale

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[10] 16 U.S.C. § 832c(a), incorporated by reference into the Regional Act in 16 U.S.C. § 839c(a). *See also*, 16 U.S.C. § 839g(c).

transactions involving nonfirm energy. The following were not subjected to an administrative analysis by BPA, and hence were not before the court of appeals:[11]

—BPA contracts with public agencies for nonfirm power.

—Amounts of nonfirm power historically sold to public agencies.

—BPA contracts for nonfirm power with investor-owned utilities.

—Amounts of nonfirm power historically purchased by investor-owned utilities.

—Amounts of nonfirm power historically purchased by persons not before the court.

—The effects BPA's decision to elevate DSI requests for nonfirm power had upon not only all of the above, but also upon the customers of public agencies, investor-owned utilities, and those persons not parties to this suit.[12]

A proper inquiry would require knowledge of not only the foregoing subjects but also an understanding of the potential impacts upon the federal power system in the Northwest. A regional approach to consideration of nonfirm power would be consistent with the regional approach to energy planning reflected in the Regional Act; it would recognize the operational realities of an interrelated system of electric power

[11] The record herein does not consist of evidence adduced in a judicial setting. Rather, it is comprised of transcribed views of persons interested in the new DSI contracts, BPA's summary and analysis thereof, BPA's interpretations and descriptions of how nonfirm energy was allocated before the Regional Act, and the challenged contractual terms.

[12] The barrenness of the factual record is amplified by reference to federal respondents' brief. It is stated, for the proposition that the DSI contracts would support the policies of the Regional Act, that "[i]ndeed, in the first year (fiscal 1982) following passage of the Regional Act, the net cash benefit of this exchange to the IOUs' [investor-owned utilities'] residential customers was $216,592,967. This same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20-year contracts, BPA estimates an aggregate cost of $10 billion." There is no citation supporting this assertion, and hence could not have been considered by the court; nor should it be considered by this Court. (Brief of Fed. Resp. at 19.)

generation, transmission and distribution. Investor-owned utilities sought but were denied such an inquiry at the administrative level.[12.5]

This proposition simply reflects ordinary principles of justiciability which call for judicial avoidance of complicated issues not fully before the court:

> "... Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give."

United States v. Fruehauf, 365 U.S. 146, 157 (1961). *See generally*, 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3529 (1975).[13]

An examination of the parties' claims and the limited record exhibits the complexity and elusiveness of the operation of BPA's hydroelectric system in the Pacific Northwest. Dealing with the implications of preference rights, and the numerous competing legislative concerns, without a comprehensive evidentiary framework invites error and long-term prejudice to th efficient operation of the Northwest's hydroelectric resources.

[12.5] "If BPA is determined to provide increased service to the top quartile, however, it must consider carefully not only the limits of prudent operation, but the equities of distributing the costs of increased service to the DSIs. The first two commitments described above will provide major benefits to the DSIs at the expense of the retail customers of both public agencies and investor owned utilities. Before proceeding with these two steps, BPA should prepare a careful analysis of the distribution of costs so that the Region can see and understand the economic implications of the proposed DSI contract." COR 8451.

[13] *See also, FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35, *reh'g denied*, 439 U.S. 883 (1978) (decision of administrative agency must be reviewed only in terms of the actual decision without reaching out to the broader statutory implications).

The public agencies do not seek a decision as to the general effect of preference upon nonfirm energy sales in the Northwest. Rather, a limited contract interpretation is sought: whether provisions of the proposed DSI contracts violated public agencies' recognized priority rights to nonfirm power.

b. Preference Decisions

The conclusion that a ruling upon the effect to be given statutory preference clauses is proper only when all relevant regional facts have been developed is buttressed by reference to cases that have construed other such clauses. In *City of Santa Clara, Cal. v. Andrus*, 572 F. 2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978), the court inspected a federal power marketing agency's complicated energy "banking" agreement with a private utility which allegedly violated a public utility's preference rights.

Contractual relationships of all customers and the federal agency were known to the court. Evidence of historical power sales, including the amounts of power sold to all affected parties was fully developed. Components and the operation of the federal system also were known. The impact of the agency's decision upon the complaining party and other customers was precisely defined. On this record, the court found that the terms of the preference provisions were violated by the "banking" sales to the non-preference utility.

However, the court stopped short of a broad holding on contract validity:

> "... The issue of the CVP's efficiency for irrigation purposes, and the likely impact of the present marketing scheme, or of Santa Clara's attack upon it, on that efficiency, were not addressed by any of the parties in their moving papers upon which the trial court rendered its decision.
>
> "In light of the paucity of information adduced on this key issue, we are loathe to hold the sale of power to PG&E at Santa Clara's expense flatly invalid. It is conceivable that

> the Secretary's decision to favor PG&E over Santa Clara in the marketing of CVP power could be justified as a measure designed to maximize the project's efficiency for its primary purpose, which is irrigation." 572 F. 2d at 672.[14]

City of Anaheim, Cal. v. Duncan, 658 F. 2d 1326 (9th Cir. 1981) illustrates not only that plenary factual development is necessary to resolve preference issues but also that the applicability of federal priority provisions is uniquely tied to particular fact situations. "Interim power"[15] sales to private utilities rather than to public agencies were upheld. The precise power demands, facilities, and all relevant communications and transactions between affected parties served as the foundation for the opinion.[16]

[14] *See also, Arizona Power Pooling Ass'n v. Morton*, 427 F. 2d 721, 72[illegible] (9th Cir. 1975), *cert. denied sub nom., Arizona Public Service Co. v. Arizona Power Pooling Ass'n*, 425 U.S. 911 (1976) (court declines to resolve issues regarding effect of preference clause due to lack of adequate information).

[15] The term "interim power" used in the case does not refer to secondary, nonfirm power, which is at issue herein. The term denoted a block of federal power available from 1974 to 1980. 658 F.2d at 1328. *See Arizona Power Pooling Ass'n v. Morton*, 527 F.2d at 725.

The court in *City of Anaheim, Cal. v. Duncan* found that had power sales contracts with private utilities not been entered into, the power plant could not have been constructed. Reasoning the preference clause did not require an "absurd" result, the court rejected the public bodies' challenge to the contracts. *City of Anaheim, Cal. v. Duncan*, 658 F. 2d at 1330.

[16] Exact details of contractual terms and the historical relationship between preference utilities and the TVA, as well as the economic consequences of the decision upon other customers were before the court in *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd*, 231 F.2d 446 (6th Cir. 1956). There a public utility urged that direct sales by TVA to a local industry violated its preference rights. The utility desired to purchase TVA power and then sell it at a profit to the industry directly served by TVA. Because of the economic benefit to TVA's customers as a whole, the court refused to strictly enforce a preference clause when doing so would be in derogation of an express statement of congressional intent. 139 F. Supp. at 26. *Volunteer* does *not* support the result urged by petitioners. It is distinguishable in terms of the statutes involved and, more importantly, by the narrow limits of the essence of the ruling: the preference clause does not require power to be indirectly sold to a private customer so that a public utility can make a profit when express statutory language authorizes a direct sale to the private customer.

The court of appeals' finding that BPA's actions violated the preference clause represents an abstract conclusion. The broad operation of the preference clause with respect to the marketing of nonfirm energy in the Northwest region should be addressed in some other proceeding. *See Coffman v. Breeze Corps.*, 323 U.S. 316, 323-24 (1945).

2. The Ninth Circuit Properly Ruled that No Change in the Allocation of Nonfirm Power was Directed in the Regional Act.

a. Background

Six days after the Regional Act became effective, a high-level BPA official met with the DSIs and stated orally the agency's interpretation of its new service commitment to the DSIs:[17] that Congress transformed the DSIs' previous rights to nonfirm power, shared equally with investor-owned utilities and subordinate to public agency entitlements, into statutorily endorsed allocations of firm-like power.[18] This official acknowledged at the time that investor-owned utilities were not all informed of the intended change in priorities or the reasons for the change. Furthermore, until commencement of this case, BPA's announced reasons for the change were consistently based upon regional energy deficits.[19]

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[17] COR 258.

[18] J.A. 107 to 110.

[19] That is, investor-owned utilities would be placing firm power supply obligations on BPA which could contribute to deficit. COR 264. BPA later argued that this deficit had not been foreseen by Congress, in fact that it was a changed circumstance justifying a departure from what BPA had told Congress about how the rate provisions of the Act would work.

> "I find that Appendix B [Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. Rep. No. 272, 96th Cong., 1st Sess. (1979); Cert. A., at F-69] tends to create an ambiguity when read with the other legislative history as to the assignment to new resources and secondly, the light [sic] of the Senate Energy Committee's caveats as to its use and the subsequent change in circumstances (including IOU load growth sales in the early years of the Act) is simply not a reliable indicator of congressional intent in view of today's circumstances."

Negotiations subsequently commenced on the new contracts. BPA negotiators would not discuss whether a change in priorities was required by the Regional Act; change was imposed on the negotiations. Negotiations instead focused upon the exact contract language to be used to describe the commitment which BPA and the DSIs read into the law. Investor-owned utilities asserted their understanding of the new law, that the Regional Act was intended "... to preserve the basic structure of DSI service, wherein one quarter of the demand is to be interruptible at the sole discretion of the Administrator."[20] This analysis was given no weight.[21]

There is no dispute among the parties that the manner in which BPA marketed nonfirm power after the Regional Act was inconsistent with its prior ministrations.

b. By Incorporating the Bonneville Project Act, Congress Intended BPA's Interpretation Thereof to be Retained.

Prior to the Regional Act, BPA marketed federal power in accordance with several statutes, including the Bonneville Project Act of 1937.[22] The Project Act contains a preference clause which commands that "...the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives."[23] Adhering to its dictates, BPA met the firm energy loads of its customers. Nonfirm, or secondary power, was then provided on request and as available to public agencies. If surplus power existed which exceeded the agencies' needs, it was distributed equally between investor-owned utilities and DSIs.[24]

BPA, *Administrator's Record of Decision, 1981 Transmission Rate Proposal, 1981 Wholesale Power Rate Proposal*, V1 to V12 (June, 1981).

[20] COR 6932.

[21] COR 6933.

[22] 16 U.S.C. § 832, et. seq. *See also*, 16 U.S.C. § 825 et seq. (Flood Control Act of 1944); 16 U.S.C. § 838 (Columbia River Transmission System Act).

[23] 16 U.S.C. § 832c(a).

[24] EIS, IV-71 (J.A. 29).

Congress expressly incorporated the preference and priority provisions of the Project Act into the Regional Act.[25] By so doing, BPA's interpretation of the Project Act, which required public agency demands for nonfirm power to be accorded priority to DSI load demands, became the will of Congress.

> "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414n.8, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366, 95 L. Ed. 337, 71 S. Ct. 337 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147, 64 L. Ed. 496, 40 S. Ct. 237 (1920); 2A C. Sands, *Sutherland, Statutory Construction* § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).[26]

Because there was no express statement of congressional intent to repudiate BPA's construction of the Project Act, BPA's new DSI contracts violated the terms of the Regional Act. *See Haig v. Agee*, 453 U.S. 280, 300 (1981) and *NLRB v. Hendricks Cty. Rural Electric Membership Corp.*, 454 U.S. 170, 177 (1981).[27]

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[25] 16 U.S.C. § 839c(a). Indeed, the Project Act and other statutes referenced in n. 22, *supra*, were not repealed by the Regional Act but continued to govern BPA's marketing responsibilities in numerous important respects.

[26] Great weight should be accorded a longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1975). *See Hillsboro National Bank v. Commissioner*, ___ U.S. ___, 103 S. Ct. 1134, 75 L. Ed. 2d 130 (1983).

[27] The legislative history of the Regional Act evinces no clear indication nonfirm power demands of public agency customers should be subjugated to DSIs' demands. To the contrary, the history is replete with indicia that the longstanding rights should be undisturbed. *See, e.g.* House Committee

c. Congress' Inclusion of Terms Previously Used by BPA to Define the Power DSIs Were to Receive Evinces Intent Not to Modify the Priorities Preexisting the Regional Act.

BPA's position, and that of the DSIs and Federal respondents herein, that the Regional Act requires the DSIs' top-quartile of power requirements to be treated as firm rests upon the following construction of the Regional Act:

(1) 16 U.S.C. § 839c(g)(1) requires BPA to offer contracts to DSIs;

(2) 16 U.S.C. § 839c(d)(1)(B) requires BPA to supply each DSI with a specified "amount of power" sufficient for its full load;

(3) 16 U.S.C. §§ 839c(d)(1)(A) and 839a(17) authorize BPA to restrict DSI power when needed to protect BPA's "firm loads" from shortages, but not for any other purpose; and

(4) 16 U.S.C. § 839c(f) prohibits BPA from selling any power — firm or nonfirm — until all obligations under the initial mandated contracts have been met.[28]

The Ninth Circuit found this reasoning to be "flawed" representing an unreasonable perception of the statutes.[29]

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on Interstate and Foreign Commerce, Pacific Northwest Electric Power Planning and Conservation Act, H.R. Rep. No. 976 (I), 96th Cong., 2d Sess. (1980) ("House Report") [Cert. A., at D-76, D-78]. The following statement is especially telling on the arguments of the DSIs and the government: "...One intended result of these procedures is that there will be no increase in firm power commitments to the direct service industrial customs [sic], except for technological improvements purposes." Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. Rep. No. 272, 96th Cong., 1st Sess. (1979) [Cert. A., at F-57].

The court below observed ambiguity in the legislative history regarding treatment of the DSI first quartile. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d 708, 713 n. 7 (9th Cir. 1982). This Court has refused to implement an administrative construction which conflicted with an earlier position when legislative history was found to be ambiguous. *See Watt v. Alaska*, 451 U.S. 259 (1981).

[28] COR 2694-2695 (J.A. 100-101); Brief of Pet., at 23-24.

[29] *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d at 712-15.

16 U.S.C. § 839c(d)(1)(B) provides:

"After December 5, 1980, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long-term contract that provides such customer an *amount of power equivalent to that which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'*" (emphasis supplied)[30]

BPA explained the quantity and quality of the power to be supplied to DSIs in their 1975 contracts, expressly referred to in § 839c(d)(1)(B), in the following manner before passage of the Regional Act:

"*Power Sales Contracts*

(a) *Industrial Firm Power*

Industrial firm power (IF) agreements provide Bonneville with several different restriction rights which provide certain specified reserves. While each kilowatt of the DSI contract demand is subject to the different types of reserves provided by Bonneville's restriction rights, the IF agreements divide the DSI contract demand into quartiles for ease of administration. Each quartile has different conditions under which service can be interrupted to provide reserves to Bonneville.

Top quartile: at any time for any period for any reason. BPA will give as much notice as possible.

This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load to be interrupted to ensure service to BPA firm loads, BPA will frequently make available Advance Energy..."[31]

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[30] The DSIs and government contend the power commitment to DSIs has two components, power quantity and power quality. It is argued that power quantity refers to the number of kilowatts DSIs are entitled to. DSIs submit that respondents did not challenge this component in the court of appeals, but instead took issue with power quality. The DSIs', and BPA's, position is that the quality of DSI power is upgraded by the Regional Act so as to be interruptible only for firm power loads. (Brief of Pet., at 24-25.)

[31] EIS, IV-84 (J.A. 31)

"*Industrial Firm Power*

As part of our 1974 rate review we started early in 1972 discussing with our industrial customers rate schedules and general rate schedule provisions for a lower grade of power than they were receiving...

After numerous meetings with our industrial customers, we arrived at what we call Industrial Firm Power. This grade of power is quite different than power sold by any other utility, any place. Each kilowatt of the Industrial Firm Power has the following characteristics:

(1) One-fourth of the contract demand can be restricted by BPA at any time.

* * * * *

With a lower grade of power to industry, the reserves are used for productive purposes and are not idle until needed to meet firm loads..."[32]

An examination of these excerpts indicates BPA did *not* consider quantity and quality to be separable concepts. Rather, both were indispensable in defining the "amount of power" DSIs could receive.[33] The phrase "industrial firm power" was included explicitly by Congress in § 839c(d)(1)(B) to define the "amount of power" allocated. Congress is presumed to know the construction placed upon this phrase by BPA, and is deemed to have adopted this construction. *CF. Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). *See also, Haig v. Agee,* 453 U.S. 280, 300 (1981).[34]

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[32] Bernard Goldhammer Memorandum (J.A. at 37, 43, 46-47). The subject of the memorandum was the 1975 contracts with DSIs.

[33] "This latter term ['industrial firm power'] does not define one particular grade of power. Rather, it denotes a new method or structure for distributing power to industry." *Port of Astoria, Oregon v. Hodel*, 595 F. 2d 467, 472 (9th Cir. 1979).

[34] The legislative history supports this conclusion. The House Report [Cert. A., at D-122 to D-123] specifically includes the term "industrial firm power" in describing the amount of power DSIs should be afforded. Longstanding formulas employed by administrative agencies to allocate federal resources should not be modified absent specific direction from Congress. *See Watt v. Alaska*, 451 U.S. 259, 271 n. 13 (1981).

Furthermore, the language of § 839c(d)(1)(B), providing that sales to DSIs shall provide a portion of BPA's reserves for firm power loads, does not exhibit an intent to bestow DSIs' top quartile loads with immunity from interruption except when necessary to meet BPA's other firm loads. Contractual commitments to DSIs, with their unique interruptibility features, have provided a portion of BPA's reserves for firm power loads for many years.[35] The statutory language on its face directs BPA to continue to utilize DSI commitments as a portion of the reserves for its firm loads, in recognition and affirmance of past practices.[36] Had Congress intended that DSI service could be interrupted *only* for firm loads in the region, § 839c(d)(1)(A) easily could have been rewritten to state "sales to DSIs shall be interrupted only for firm power loads." See *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982).[37] As an administrative practice in effect before the Regional Act, of which Congress was aware and incorporated into the legislation, the Court should give force to the longstanding practice. *Cf. Lorillard v. Pons, supra,* and *Haig v. Agee, supra.*[38]

[35] *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979). BPA's announcements also disclose the historic and well-established use of DSI loads as reserves for BPA's other firm power loads. *See e.g.*, EIS, at IV-84 (J.A. 31); Bernard Goldhammer Memorandum (J.A. 46).

[36] "The Committee amendment specifically authorizes the Administrator to enter into new contracts with these direct service industries. These contracts will provide power in amounts equal to, but not greater than, that which these companies are now entitled under existing contracts with BPA, and *the terms of these contracts will require that these companies continue to supply reserves for the region.*" (emphasis supplied) House Report, Cert. A., at D-69.

[37] 16 U.S.C. § 839a(17) promotes the same result. Reserves are defined as the electric power needed to avert shortages for the benefit of firm power *customers*. As noted, DSI loads have operated as reserves for firm power customers. The operational word of the provision is "customers". Congress could have readily revised the subsection to define reserves as power needed to protect the *customers' firm loads*. Had such sentence structure been used, the DSIs' and government's arguments would be entitled to more weight.

[38] It was correctly concluded by the Ninth Circuit that while deference was due to BPA's construction of the new act, BPA's views of the statutes were not controlling. This Court has stated:

CONCLUSION

The decision of the Ninth Circuit should be modified, but affirmed.

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> "'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"

General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976), *reh'g denied* 429 U.S. 1079 (1977), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also, Watt v. Alaska*, 451 U.S. 259, 273 (1981).

Under these criteria, BPA's actions fare poorly. As previously discussed, its ruling was inconsistent with prior interpretations and unsupported by the terms of the Regional Act and its legislative history. Lack of thoroughness is exhibited by BPA's failure to address and answer the impacts of its statutory construction in these substantive areas:

(1) DSI contract demand in agreements that preceded the Regional Act totaled approximately 3600 megawatts (hereinafter "MW"). Under the contracts here in issue BPA has committed to supply DSIs with approximately 3800 MW of electric energy. (Table, J.A. 20.) Prior to the Regional Act, BPA divided this demand into fourths, or quartiles, each quartile having various interruptibility characteristics. (EIS, J.A. 31-34.) The Top Quartile, approximately 900 MW of power, was interruptible at any time, allocated from nonfirm power, and was available on an equal basis with investor-owned utilities. (EIS, J.A. 29, 31.)

In the new contracts, the Top Quartile, now approximately 950 MW, was transformed into firm power, and deemed superior to claims of public agency and investor-owned utilities to nonfirm power. Under BPA's determination, the federal system must be operated to provide an additional 1000 MW; before, it was discretionary whether the system should be operated to meet this load. Inadequate consideration was given by BPA of the effect on system resources and potential long-term impact such operation would cause.

(2) Traditionally, investor-owned utilities could rely on BPA's ability to supply power in years when the water level was more than critical. Hence, after firm loads were met, inexpensive nonfirm federal power was available for its customers. If 1000 MW of nonfirm power remained after meeting firm and public agency demands, investor-owned utilities had access to 500 MW of power as did DSIs. However, under its new mandate, investor-owned utilities can no longer rely on BPA. Only if there is in *excess* of 1000 MW over the historical critical level will investor-owned utilities be able to purchase federal power. The result is more reliance on relatively expensive thermally generated power. Because investor-owned utilities are required by law to meet their customers' needs, construction of thermal power plants could be indicated. BPA failed to give due consideration to these likely, expensive economic consequences to ratepayers of investor-owned utilities, as well as the economic impact on customers of public agencies.

(3) There is no rectification of BPA's approach with the portions of the Regional Act directing service to investor-owned utilities. Investor-owned utilities, like DSIs, were allocated rights to purchase power under the Regional Act. See, e.g., 16 U.S.C. §§ 839c(b)(1) and (g)(1). Yet BPA's new DSI contracts at the very least interfere with BPA's ability to perform as directed.

(4) One major purpose of the Regional Act, largely ignored by the DSIs and the government in their arguments, was to encourage conserva-

tion and development of renewable resources within the Pacific Northwest. 16 U.S.C. § 839. BPA was instructed to implement this purpose, and to encourage DSIs to develop methods to promote its furtherance. 16 U.S.C. § 839b(e)(4). Yet BPA's treatment of DSIs frustrates this strong statement by Congress. It is unreasonable to conclude that federal power resources would be conserved by placing an additional firm burden of 1000 MW thereupon. Nor are DSIs encouraged to explore conservation or techniques to reduce their demand on the federal system: DSIs' power needs would be completely met. Affirming the ruling of the Ninth Circuit would promote Congress's explicit statement. Because one-fourth of the DSIs' power requirements are uncertain, incentives exist for DSIs to explore conservation and renewable technologies to assure continued operation of their businesses.